

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ANDREW PERRONG

Plaintiff

vs.

BUILDING OPPORTUNITIES LLC
ET AL

Defendants.

Case No. 2:20-cv-06138

JURY TRIAL DEMANDED

PLAINTIFF'S MOTION TO VACATE DISMISSAL UNDER LOCAL RULE 41.1(b)

Pursuant to Local Rule 41.1(b), Plaintiff Andrew Perrong motions this Court to vacate its order of February 18, 2021 dismissing this action without prejudice under Local Rule 41.1(b). (*See* ECF No. 14.) In support thereof, Plaintiff avers as follows:

Plaintiff filed this action against Defendants Building Opportunities, LLC and Francis McGovern on December 16, 2020. (ECF No. 1.) On February 17, 2021, the parties agreed on a settlement in this matter, subject to the execution of a signed settlement agreement. The parties notified the Court of the same and the Court issued an order on February 18, 2021 dismissing the case without prejudice under Local Rule 41.1(b). (*See* ECF No. 14.) On March 11, 2021, the parties signed a confidential settlement and release, under which Defendants were to pay the Plaintiff a Settlement Payment by April 10, 2021.

On April 13, 2021, the Plaintiff deposited the check for the Settlement Payment at his financial institution. However, on April 15, 2021, Plaintiff received notice from his financial institution that the check had been dishonored. That same day, Plaintiff contacted counsel for the Defendants,

who stated that he would “reach out to [Mr. McGovern] ASAP.” On April 19, 2021, Plaintiff received additional information indicating that the check was dishonored because it was drawn on an invalid or closed account. *See* Exhibit A. Plaintiff attempted to confer with counsel regarding this latest information and was told that the client stated that the account was active. Of course, such a representation is impossible as the account is closed. Counsel stated that he would work with the client to secure an alternate form of payment a week ago, but Plaintiff has not heard back since that time, despite having sent a follow-up e-mail.

Local Rule 41.1(b) permits the Court to vacate, modify, or strike from the record an entry of an order of dismissal under Local Rule 41.1(b) “for cause shown, upon the application of any party served within ninety (90) days of the entry of such order of dismissal, provided the application of the ninety-day time limitation is consistent with Federal Rule of Civil Procedure 60(c).” Local Rule 41.1(b). The analysis of what constitutes “cause” for vacatur under this Local Rule is guided by the standards in Federal Rule of Civil Procedure 60(b). *King v. Banner*, No. CIV. A. 07-0704, 2010 WL 3656030, at *2 (E.D. Pa. Sept. 17, 2010). One of the grounds under Rule 60(b) for relief is “fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party.” FED. R. CIV. P. 60(b)(3).

Under Pennsylvania law, the return of a check as dishonored because of an invalid or closed account gives rise to the presumption that the Defendant had no such account at the time the check was issued. *See* 18 PA. CONS. STAT. § 4105(b)(3). Here, the passing of a check on an account that the Defendants knew was either invalid or closed is the exact sort of misrepresentation and fraudulent conduct contemplated by Rule 60(b)(3).

In the alternative, the dishonor of a settlement payment qualifies as reason to justify relief vacating the dismissal under Rule 60(b)(6) because without a settlement payment, the parties have

not performed under the agreement. It would justify relief to strike the dismissal so that this case may proceed, considering the Defendants have elected not to pay the Plaintiff and breach the agreement.

Wherefore, the Plaintiff prays that this Court vacate its order of February 18, 2021 dismissing this action without prejudice under Local Rule 41.1(b) and grant any other relief it deems meet and just.

Dated: **April 26, 2021**

_____/s/_____

Andrew Perrong
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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2021, I electronically transmitted the foregoing to all counsel of record via the electronic filing system.

By: /s/_____
Andrew Perrong

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PROPOSED ORDER:

AND NOW, this _____, day of _____, 2021, it is hereby ORDERED that the order of February 18, 2021 dismissing this action without prejudice under Local Rule 41.1(b) (ECF No. 14), is VACATED.

Hon. Wendy Beetlestone, J.